STATE OF MICHIGAN

COURT OF APPEALS

HOLLY A. BAILEY,

Plaintiff-Appellee,

and

ANDREW BAILEY,

Plaintiff,

v

LAURA D. JERRETT,

Defendant-Appellant.

UNPUBLISHED
November 20, 2001

No. 223888
St. Clair Circuit Court
LC No. 97-003624-NZ

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from a default judgment, entered pursuant to MCR 2.603, awarding plaintiff Holly Bailey $50,000 in economic and non-economic damages in an action based on slander. Judgment was entered following a one-day bench trial on the issue of damages after the trial court previously denied defendant's motion to set aside the entry of default. We affirm.

Plaintiffs were husband and wife, and defendant was husband's former girlfriend with whom he had a child.[1] Plaintiff alleged that defendant made numerous disparaging statements about her to others, which statements constituted slander per se and resulted in plaintiff losing two jobs.

Plaintiff filed for entry of default approximately nine months after defendant, having been properly served with the complaint, failed to plead or otherwise respond as required by MCR 2.108.[2] Default was entered on September 4, 1998, and defendant filed an appearance,

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[1] Plaintiff husband was voluntarily dismissed prior to trial; therefore, we will refer to plaintiff wife as plaintiff in the singular, unless otherwise indicated.

[2] The complaint was filed on December 16, 1997.

motion to set aside default, and counsel's affidavit on September 11, 1998.[3] On September 18, 1998, defendant filed an answer along with a demand for jury trial. On September 21, 1998, a hearing was held on the motion to set aside the default, and the trial court denied the motion.[4]

At the motion hearing, the trial court found that defendant's excuse of miscommunication and misunderstanding between herself and counsel, who was acting as defendant's counsel in a separate lawsuit between defendant and plaintiff husband, was not sufficient to establish "good cause" required under MCR 2.603(D)(1).

Defendant first argues that the trial court abused its discretion in denying her motion to set aside the entry of default because the miscommunication and misunderstanding arising from her incarceration that led her to believe that counsel was retained was sufficient to establish "good cause" for failing to timely respond. Defendant argues that "good cause" was established based on "reasonable excuse" and "manifest injustice." According to defendant, "reasonable excuse" was established based on the alleged miscommunication between defendant and counsel, and "manifest injustice" was established, in part, based on a "meritorious defense" and failure of the complaint to state a cause of action. We disagree.

We review the trial court's decision to deny relief from entry of default under MCR 2.603(D)(1) for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).[5] "Good cause" and "meritorious defense" are separate analytic

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[3] Defendant's affidavit of "meritorious defense" was not included in the trial docket and the court refused counsel's attempts to include it later, concluding that because defendant had failed to establish "good cause" there was no need to consider the meritorious defense. This affidavit was subsequently inserted in the court file pursuant to an order granting defendant's motion to correct the defect in trial record.

[4] In February 1999, the trial court denied defendant's request for a jury trial.

[5] We recognize that *Alken-Ziegler* was decided after entry of the default judgment in the present case; however, we believe that our Supreme Court's decision controls our analysis in this matter. In *Bolt v Lansing*, 238 Mich App 37, 44; 604 NW2d 745 (1999), this Court stated that generally, a judicial decision is to be given complete retroactive effect. A decision should be applied prospectively if the decision overrules settled precedent. *Id.* A key consideration is whether the judicial decision announced a new and unexpected rule of law, or merely clarified, extended, or interpreted existing law. *Id.* Here, we address whether "manifest injustice" is a factor to consider in determining "good cause" under MCR 2.603, and the *Alken-Ziegler* decision makes clear that it is not. The decision recognized that some appellate decisions included "manifest injustice" as a factor to consider in determining "good cause". *Alken-Ziegler, supra* at 230. Our Supreme Court noted that the decisions blurred the separate inquiries of "good cause" and "meritorious defense" contained in MCR 2.603, and the Court also acknowledged earlier Supreme Court precedent correctly separating the inquiries. *Id.* at 231-232. We believe that the *Alken-Ziegler* Court merely clarified existing law; therefore, the case has retroactive effect. We also note that in *Zaiter v Riverfront Complex Ltd*, 463 Mich 544; 620 NW2d 646 (2001), our Supreme Court applied the *Alken-Ziegler* principles to a default ruled upon by the circuit court before *Alken-Ziegler* was decided.

concepts, and a party must show both to prevail on a motion to set aside a default judgment. *Id.* at 233. Where a party fails in a showing of "good cause," there is no need to reach the question of "meritorious defense." *Zaiter v Riverfront Complex Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001). "Good cause" sufficient to warrant setting aside a default includes: (1) a substantial defect or irregularity in the proceeding on which the default was based, or (2) a reasonable excuse for failure to comply with requirements that created the default. *Alken-Ziegler, supra* at 233.

In the instant case, all arguments asserting "good cause" based on manifest injustice are rejected pursuant to the holding in *Alken-Ziegler*.[6] Defendant did not argue that there was a substantial defect or irregularity in the proceedings. Additionally, defendant's claim of "reasonable excuse" lacks merit. Based on review of the correspondence between defense counsel and plaintiff's counsel, it is clear that either defendant or defense counsel was negligent in failing to pursue a defense in this case.[7]

An attorney's negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995). Here, in circumstances where no proof was adduced that counsel had withdrawn from fielding matters concerning the filing of an answer, as evidenced by the correspondence and regardless of whether counsel intended to appear on defendant's behalf, one must reasonably conclude that any failure to act, one way or another, was negligence on the part of counsel. The trial court did not abuse its discretion in denying defendant's motion to set aside the default.

Defendant next argues that she was entitled to a jury trial on the issue of damages pursuant to MCR 2.603(B)(3)(b). We disagree. The decision regarding whether a party is entitled to a jury trial is reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998). Defendant's answer and demand for jury trial were filed after the default was entered, and because the default was not set aside, the filing was not legally recognizable. MCR 2.603(A)(3). MCR 2.603(B)(3)(b) provides for a jury trial as to the amount of damages "to the extent required by the constitution." Const 1963, art 1, § 14, provides that "[t]he right to jury

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[6] Additionally, defendant's argument that "good cause" was established based on failure to state a claim was not properly preserved. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

[7] If defense counsel provided defendant with copies of all correspondence, she would have been on notice of a deadline and the need to obtain representation, and the letters indicate that defendant knew that defense counsel would not file an answer. March 11, 1998 correspondence from defense counsel to plaintiff's counsel confirmed a thirty-day extension to file an answer, stating "It does not appear that I will be defending that case [slander action] and Ms. Jerrett obviously has to coordinate retaining counsel." March 30, 1998 correspondence from defense counsel stated "Additionally, [defendant] is having some difficulty obtaining counsel. May I assume that we can have an additional period of time until an answer is filed on the defamation action." April 17, 1998 correspondence from plaintiff's counsel stated "Regarding the defamation action, I similarly must proceed to litigate this matter. Please file an Answer on Ms. Jerrett's behalf prior to May 1, 1998. If no answer is filed, I will have no choice to proceed accordingly."

trial shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." MCR 2.508(B)(1) requires that a demand for jury be made "within 28 days after the filing of the answer or a timely reply." A defaulting party who has failed to preserve the right to a jury trial loses the right on the issue of damages. *Equico Lessors, Inc v Original Buscemi's, Inc*, 140 Mich App 532, 536; 364 NW2d 373 (1985). Here, there was no proper demand, and the trial court did not err in denying defendant's request for a jury trial.

Defendant next argues that the trial court erred in denying her motion to dismiss, raised at trial, because the complaint failed to state a cause of action and because the statute of limitations barred the action. We disagree. In the context of a motion for involuntary dismissal made at trial, this Court reviews findings of fact for clear error, and issues of law de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). As to the statute of limitations argument, defendant failed to raise the defense as part of a responsive pleading or in a motion as required by MCR 2.111(F)(3); therefore, the defense was waived. *Liddell v DAIIE*, 102 Mich App 636, 654; 302 NW2d 260 (1981). Moreover, entry of a default is equivalent to an admission by the defaulting party as to all well-pleaded allegations; therefore, defendant is estopped from litigating issues of liability. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000).[8]

Defendant's claim that dismissal was appropriate because the complaint failed to state a cause of action also lacks merit. The elements of a cause of action for defamation consist of (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Burden v Elias Brothers Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000). Defendant claims that the complaint lacked specifics regarding dates of publication, and to whom publication was made. However, a complaint is sufficient if it gives notice of the nature of the claim sufficient to allow the opposing party to take a responsive position. *Goins v Ford Motor Co*, 131 Mich App 185, 195; 347 NW2d 184 (1983). The complaint in the instant case provided defendant with sufficient notice of a slander action giving defendant the opportunity to take a responsive position.[9]

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[8] Defendant's reliance on *Horvath v Delida*, 213 Mich App 620; 540 NW2d 760 (1995), is misplaced because the defendant did assert the statute of limitations as an affirmative defense in that case. *Id.* at 628.

[9] Case law cited by defendant suggesting that additional detail is required in a slander complaint is distinguishable, and not appropriate to consider in the context of a default. Plaintiff could have amended her complaint to add details regarding publication, which details were testified to at trial, had defendant responded appropriately to the complaint. Because default judgments are appropriate to prevent dilatory defendants from impeding a plaintiff in establishing his claim, *Levitt v Kacy Mfg Co*, 142 Mich App 603, 609; 370 NW2d 4 (1985), this defendant will not be rewarded for error to which she contributed to by plan or negligence. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).

Defendant next argues that the trial court abused its discretion in allowing plaintiff to amend her pleadings at trial, through the admission of evidence not in conformity with the complaint, in violation of MCR 2.118(C)(2). We disagree. The challenged testimony regarded additional statements made by defendant concerning drugs and a personal protection order [PPO], and injuries suffered by plaintiff when she fainted and fell when served with the PPO. Defendant was not prejudiced by the testimony, MCR 2.118(C)(2), and any error was harmless. MCR 2.613(A). Liability for slanderous statements was admitted based on the default, and the minor additional slanderous statements related to drug activity, which was alleged in the complaint. Moreover, the injuries sustained in the fall were only considered by the trial court in the context of non-economic damages concerning nervousness and anxiety caused to plaintiff, which were sufficiently established by plaintiff's testimony and the other slanderous statements alleged in the complaint.

Defendant next argues that the trial court erred in allowing hearsay to be presented through plaintiff's testimony.[10] We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 620-621; 550 NW2d 580 (1996). The claimed hearsay evidence consisted of plaintiff's testimony that witnesses told plaintiff that defendant was making slanderous statements, testimony that the slanderous statements caused her to lose her jobs, and testimony regarding a doctor's diagnosis that she had a nervous condition. The testimony regarding slanderous statements,[11] and the statements regarding job losses, were admitted because the allegations were contained in the complaint and a default was entered; therefore, defendant was liable, and any hearsay error was harmless. MCR 2.613(A); *Boerman, supra* at 79. Plaintiff's testimony established, without reference to hearsay, the amount of earnings derived from her employment, and this testimony proved the amount of her economic damages. The amount of damages is the only matter at issue. MCR 2.603(B)(3)(b). As to the doctor's diagnosis, any hearsay error was harmless, MCR 2.613(A), because plaintiff herself testified that she was suffering from severe nervousness, anxiety attacks, bouts of crying, and depression. Moreover, we note that slander per se, as codified in MCL 600.2911(1), is involved in the instant case, and damages are presumed in such circumstances. *Burden, supra* at 730. Harmed feelings are appropriately considered in determining damages in a slander action. MCL 600.2911(2)(a).

Finally, defendant argues that the trial court erred in denying defendant's motion for new trial and JNOV because damages were excessive as precluded by privilege, because hearsay evidence was admitted, and because the action was barred by the statute of limitations. We disagree. This Court reviews de novo the evidence presented at trial to determine if the trial court clearly erred in denying defendant's motion for JNOV. *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999). The decision whether to grant a new trial is reviewed for an abuse of discretion, while any questions of law that arise are reviewed de novo. *Kelly v Builders Square Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

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[10] Plaintiff was the only witness at trial.

[11] Additionally, these statements cannot be considered hearsay because they were not offered "to prove the truth of the matter[s] asserted." MRE 801(c).

First, we dispose of defendant's claims premised on hearsay and the statute of limitations for the reasons stated above. Defendant's argument concerning privilege once again attacks the sufficiency of plaintiff's complaint. We recognize that MCR 2.116(D)(3) allows a party to challenge the sufficiency of a complaint at any time, and that a default judgment cannot be entered if a complaint fails to state a cause of action. *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981). However, defendant's claim lacks merit. A slander claim requires an unprivileged publication to a third party. *Burden, supra* at 726. Defendant's argument relates to the PPO, which defendant claims "is absolutely privileged on its face." Initially, as noted above, we find no reason to reverse the trial court based on the PPO, and the PPO was not alleged in the complaint as noted by defendant. Further, plaintiff's complaint alleged numerous slanderous statements made to others, and plaintiff's testimony indicated that these statements were made, in part, to family members, friends, teachers, and employers. Defendant makes no argument that these instances of publication involved privileged communications. If any publication was made by defendant to others, such as police and court officials in obtaining the PPO, the publication did not invalidate the damages award, which was premised on loss of employment, loss of employment perks, anxiety, nervousness, and depression, because sufficient slanderous, non-privileged statements were made to others that related to those damages.

Because liability was admitted, and plaintiff established recognizable damages pursuant to MCL 600.2911(2)(a)[harm to profession, occupation, or feelings], along with presumed damages, there was no error in awarding plaintiff $50,000 in damages.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy